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**In
The Supreme Court
of the United States**

OCTOBER TERM, 1940

No. 54

MARTIN J. BERNARDS and LENA BERNARDS,
his wife,

Petitioners.

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), and JOSEPH M.
LOOMIS, Trustee,

Respondents.

Upon Writ of Certiorari to the United States Circuit Court of
Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT CATHERINE COLLINS

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STATEMENT OF FACTS

The following chronological outline of proceedings
will serve as a basis of fact for determining the rights of
the parties:

<u>Record</u> <u>page</u>	<u>Date of</u> <u>filing, etc.</u>	<u>Proceedings</u>
	<u>1933</u>	
73	April 12	Catherine Collins commenced foreclosure of her mortgage in State Court.

<u>Record page</u>	<u>Date of filing, etc.</u>	<u>Proceedings</u>
	<u>1934</u>	
72	April 6	Johnson and Bank commenced foreclosure of their mortgage in State Court.
72	July 11	State Court entered decree in Johnson and Bank foreclosure.
1	August 10	The Bernards filed petition for composition-extension.
3	August 10	District Court order restraining Sheriff, Johnson and Bank from proceeding with sale of debtors' real and personal property under a foreclosure decree in Oregon Circuit Court or from interfering with debtors' possession. (This order was set aside as of Feb. 18, 1935 (R 74) because the stay under Section 75 (a) to (r) is self-executing and the order was superfluous.)
6	August 10	Reference of case to Conciliation Commissioner.
6	October 17	Conciliation Commissioner discharged on his report that debtors and creditors could not agree.
7	October 27	Debtors petition that they wished to submit a second proposal to creditors and asking for reference to Conciliation Commissioner.

<u>Record page</u>	<u>Date of filing, etc.</u>	<u>Proceedings</u>
8	October 29	Case re-referred to Conciliation Commissioner.
8	December 15	Conciliation Commissioner reported that a second meeting with creditors was held December 4, 1934. A proposal was made by debtors which was rejected by Johnson, majority creditor.
9	December 19	The Bernards filed amended petition under Section 75 (s).
13, 14	December 19	Adjudication of bankruptcy.
14	December 20	Order of reference to referee in bankruptcy.
<u>1935</u>		
36	February 8	The bankrupts petitioned for appraisal and for possession under 75 (s).
15	May 21	Selection of appraisers.
	May 27	Section 75 (s) held unconstitutional in Radford case.
145	June 28	The bankrupts attempted a third proposal for composition which was denied by the court because of previous adjudication in bankruptcy.
72	June 29	Sale in Johnson and Bank foreclosure.

<u>Record page</u>	<u>Date of filing, etc.</u>	<u>Proceedings</u>
73	July 9	State Court entered decree in Collins foreclosure.
73	August 26	Sale in Collins foreclosure.
	August 28	Amended Sec. 75 (s) became effective.
16	September 30	The bankrupts petition District Court that Referee transfer all documents and records to the Court together with report.
17	September 30	Order directing Referee to return record, etc.
19	October 15	Order of reference to Conciliation Commissioner.
48	December 18	District Court order dissolving restraining order made Oct. 3, 1935 against Sheriff from executing writ of assistance requiring Sheriff to oust bankrupts from possession of real property described in bankrupts petitions. <i>(No appeal taken).</i>

1936

	June 29	Redemption period on Johnson and Bank foreclosure expired (Oregon Code 1930, Sec. 3-505).
138	July 1	Sheriff's deed issued to Johnson and Bank on their foreclosure.

<u>Record page</u>	<u>Date of filing, etc.</u>	<u>Proceedings</u>
19	July 15	The bankrupts petitioned Conciliation Commissioner for order granting immediate possession of Parcel 15, restraining Mrs. Collins from transferring said property and for extension of redemption period.
22	August 8	Bankrupts reply to answer and petition of Johnson and Bank.
49, 135	August 8	Conciliation Commissioner made order and decree denying petition of July 15, 1936. (<i>No appeal taken</i>).
	August 26	Redemption period on Collins foreclosure sale expired. (OC 1930 Sec. 3-505).
54	August 29	Order of Conciliation Commissioner appointing trustee.
54	September 3	Order approving trustee's bond.
73	September 10	Sheriff's deed issued to Mrs. Collins on her foreclosure.

The foregoing outline contains all items shown in the Record in the proceedings in the foreclosures and in bankruptcy down to the date of the sheriff's deed to Mrs. Collins.

The foreclosure proceedings of the mortgage belong-

ing to the respondents, Johnson and The United States National Bank of Portland, Oregon, closely coincide with Mrs. Collins' foreclosure as to dates, and their respective legal rights are substantially the same. Mrs. Collins, however, has no claim to the bankrupts' property other than under her mortgage on Parcel 15; that is, she has no deficiency judgment or general unsecured claim. She is, therefore, not interested in the personal property or the acts of the appraisers and trustee concerning it.

Respondents Johnson and the Bank, on the other hand, have a deficiency judgment and a general claim, and are, consequently, interested in obtaining dividends out of the proceeds of sale of the personal property.

SUMMARY OF ARGUMENT

This respondent adopts the argument in the brief of respondents Johnson and Trustee, except pages 44 and 45 relating the appointment and acts of the trustee, and further submits the following:

Each step taken in the foreclosure of Mrs. Collins' mortgage was at a time when the Circuit Court of the State of Oregon for Washington County had exclusive jurisdiction, because, as the Circuit Court of Appeals properly held,

- I. The stay of foreclosure provided in Section 75 (o) of the Bankruptcy Act applies only to a period

"prior to the confirmation or other disposal of the composition or extension proposal" which period expires when the debtor is adjudged a bankrupt.

- II. The stay under Section 75 (s) is not an automatic stay, but is a judicial stay to be granted upon compliance with specified conditions. Bankrupts never obtained, and—upon the facts found—were never entitled to any such stay.

ARGUMENT

INTRODUCTION

No question has been raised as to the regularity of Mrs. Collins' foreclosure, provided the State Court had jurisdiction.

Mrs. Collins claims that the State Court regained jurisdiction of her pending mortgage foreclosure on December 19, 1934, when the order of adjudication in bankruptcy was entered, because on that date and by that order any stay provided in the composition-extension proceeding was terminated and the State Court was at liberty to proceed with the foreclosure.

It is further contended by Mrs. Collins, that the only later stay possible for the bankrupts to obtain was under Section 75 (s) paragraph 2, and that the bankrupts never complied with conditions necessary to obtain such a stay.

On the other hand, the bankrupts claim that the stay under Section 75 (o) was not terminated by the adjudication in bankruptcy on December 19, 1934, or otherwise, and is still in existence, prohibiting any step being taken in the foreclosure since August 10, 1934, when the bankrupts filed their petition for composition-extension. On page 28 of their brief the bankrupts express the difference between the two positions as follows:

"In the light of the Kalb decision interpreting Section 75, there can be no doubt but that the provisions of sub-sections (n) and (o) remain in effect after the farmer-debtor amends his petition asking to be adjudged a bankrupt and after an adjudication pursuant to such request.

"The decision of the Circuit Court of Appeals, here in question, holds that the adjudication on December 19, 1934, under the invalid subsection (s) was a disposition of the proceedings for composition or extension and a termination of the stay provided by sub-section (o)."

POINT I.

THE STAY OF FORECLOSURE PROVIDED IN SECTION 75 (o) OF THE BANKRUPTCY ACT APPLIES ONLY TO A PERIOD "PRIOR TO THE CONFIRMATION OR OTHER DISPOSAL OF THE COMPOSITION OR EXTENSION PROPOSAL" AND EXPIRES WHEN THE DEBTOR IS ADJUDGED A BANKRUPT.

Section 75 of the Bankruptcy Act, under which this case has proceeded, is composed of two parts, first, sub-sections (a) to (r) containing the provisions for composition or extension, and second, sub-section (s), providing for a farmer's adjudication as a bankrupt, coupled with a stay of three years for any conflicting proceedings, during which time he shall have possession of the farm on a rental basis, all under the supervision of the Court.

In order to determine how long the stay granted in (n), (o) and (p) continues in effect, it is necessary to examine the history of the act. Original Section 75 consisted of sub-sections (a) to (r), and was enacted March 3, 1933 (c. 204 Section 1, 47 Stat. 1470). While these sub-sections have been amended, they remain substantially the same as when first enacted.

They provide that on petition a farmer debtor may propose a composition or extension of time to pay his debts, and if acceptable to his creditors, the proposal is confirmed by the court. Sub-section (l) provides, "Upon

the confirmation of a composition the consideration shall be distributed under the supervision of the conciliation commissioner as the court shall direct, and the case dismissed. Upon the confirmation of an extension proposal the court may dismiss the proceeding or retain jurisdiction of the farmer and his property during the period of the extension in order to protect and preserve the estate and enforce through the conciliation commissioner the terms of the extension proposal."

During the composition-extension proceeding thus provided for the Bankruptcy Court has exclusive jurisdiction between the date of the filing of the petition and the date of the disposition by the Court of the composition-extension proposal.

In considering the meaning of the language of Section 75, it is well to keep in mind the separate nature of the (a) to (r) and the (s) provisions of the section.

The composition-extension provisions treated the farmer debtor as a person free to negotiate with his creditors and to make a contract with them as to terms of payment, both by reduction in amounts payable to his creditors, and extension of time in which to pay. He was provided with the help of the Conciliation Commissioner and no other court was allowed to proceed against him or his property during the pendency of the composition-extension proceeding.

This earlier part of Section 75 furnishes the farmer a remedy complete in itself and until June 28, 1934, when sub-section (s) was added, could not have had any relation to sub-section (s).

Commencement of proceedings under (a) to (r) both as to time and method, is provided for in (c) and the subsequent procedure in composition-extension is provided for. The manner and time of terminating those proceedings needs some examination. As noted above, sub-section (l) provides for a final termination where distribution is made under a composition which has been confirmed, and also provides for a conditional termination where an extension proposal has been confirmed. However, in a case like the present one where the proposal has not been accepted by the creditors, the termination is not so clear. In such event there are, however, three ways in which the proceeding may be disposed of.

1. Rule 50 of the "General Orders in Bankruptcy", subdivision (4) provides, "If the farmer has not applied for confirmation within such reasonable time as has been finally fixed therefor, which shall be not later than three months after the date of the first meeting, the conciliation commissioner shall, unless the judge for cause shown shall have permitted a further extension, forthwith report the facts to the judge, who shall thereupon dismiss the proceedings."

2. The first sentence in (s), both old and new, provides, "Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt."

3. A filing of a voluntary petition in bankruptcy and obtaining an adjudication.

In the present case the farmer failed to obtain the acceptance of his proposal for a composition or an extension and chose to be adjudicated a bankrupt under the first sentence of (s) on December 19, 1934. The adjudication of the farmer as a bankrupt operated as a disposition of the composition or extension proposal. This is the only result consistent with a logical interpretation of the act. The act itself provides for no other way for a court's disposition of the composition or extension agreement. The interpretation contended for by petitioners, that the stay provided for by (o) continues until all proceedings, including those under (s) are disposed of, is denied not only by the wording of (o), but by the fact that (s) contains its own stay provisions in paragraph 2.

Neither *Kalb v. Feuerstein*, 308 U. S. 433 nor *Union Joint Stock Land Bank v. Byerly*, 310 U. S. 1, discuss this question. They cannot be said to be controlling here.

If the adjudication is a *disposition* of the composition-

extension proposal, then the stays provided for under 75 (o) are concluded by such adjudication and the creditor is free to pursue his remedy outside of the bankruptcy court until a stay is obtained under (s) paragraph 2, as will be hereinafter shown. See *Hardt v. Kirkpatrick* (C. C. A. 9), 91 F. (2d) 875.

No stay was ever obtained under the terms of (s) (2) in the present case. All the steps taken to complete Mrs. Collins' foreclosure were taken during this period after the stay provided by 75 (o) had terminated. Consequently Mrs. Collins obtained her rights by virtue of a foreclosure during which the Oregon courts were not subject to the stays provided by either (o) or (s) (2) of Section 75.

But the Petitioner argues. The effect of the adjudication of December 19, 1934 was nullified by *Louisville Joint Stock Land Bank vs. Radford*, 295 U. S. 555.

When the Radford case declared certain provisions in old (s) were unconstitutional, it did not disturb other parts of old (s).

This is shown by the identity of the first part of the Frazier-Lemke acts in both of which the introductory paragraph and that part of the first sentence in paragraph (1) ending with the words "The debtors' property shall remain in the debtor", are substantially identical. Also, paragraph (5) of the new act provides: "This act shall be held to ap-

ply to all existing cases now pending in any Federal Court, under this act, as well as to future cases; and all cases that have been dismissed by any Conciliation Commissioner, Referee, or court, because of the Supreme Court decision holding the former sub-section (s) unconstitutional shall be promptly reinstated without any additional filing fees or charges."

In *Union Joint Stock Land Bank v. Byerly*, 310 U. S. 1, 60 Supreme Court 773, one item in the statement of facts reads "May 27, 1935, this court held certain features of Section 75 (s) unconstitutional." This court apparently has not considered that the Radford case nullified all of old (s).

Moreover, all parties concerned, including the District Judge, Conciliation Commissioner, the respondents and particularly the bankrupts, have from the time of the petition and adjudication, December 19, 1934 on through the bankruptcy proceedings acted only under either old (s) or new (s). The result of the foregoing is that the amended petition and adjudication on December 19, 1934 have been treated by all parties as valid. The bankrupts themselves considered it unnecessary to file another amended petition after the enactment of new (s).

But even in the absence of (s) and even assuming that it was invalid the stay provided for under (o) would still have been terminated. In the absence of (s) the

debtor could have applied for a voluntary adjudication in bankruptcy. Such an adjudication would amount to another *disposition* of the composition-extension proposal. After the adjudication the proposal was at an end and ordinary bankruptcy rules would then regulate the treatment of suits in non-bankruptcy courts.

No matter from what angle it is considered the composition-extension proposal was terminated. The debtor had caused the court to make a disposition.

Were there any other stays in effect to challenge the state court's jurisdiction during the foreclosure period? The Petitioners failed to obtain any stay and such stays as were available were not automatic.

POINT II

THE STAY UNDER SECTION 75 (s) IS NOT AN AUTOMATIC STAY, BUT IS A JUDICIAL STAY TO BE GRANTED UPON COMPLIANCE WITH SPECIFIED CONDITIONS. BANKRUPTS NEVER OBTAINED, AND UPON THE FACTS FOUND, WERE NEVER ENTITLED TO ANY SUCH STAY.

Because the adjudication terminated all the composition-extension proceedings, including the stay under (o), it was necessary, in order that the bankrupts might obtain a stay of Mrs. Collins' foreclosure suit and the right of

possession of the mortgaged land, that they proceed as provided in (s) by obtaining an appraisal of the property and exemptions and an order that they remain in possession.

On February 8, 1935 they petitioned for appraisal and possession under old (s). (R. 36) Appraisers were selected on May 21, 1935, (R. 15) but on May 27, 1935 old (s) was declared unconstitutional.

As previously stated, after December 19, 1934, when the adjudication in bankruptcy was entered and the stay under (o) terminated, the Circuit Court of the State of Oregon regained jurisdiction. No action was taken, however, in the State court until after the Radford case, when the State court having jurisdiction proceeded with the foreclosure, and on July 9, 1935 entered its decree of foreclosure. (R. 73) This was followed on August 26, 1935 by the foreclosure sale of the mortgaged property. (R. 73) Under the Oregon statute this sale entitled Mrs. Collins, as purchaser at the sale, to possession of the premises, which was taken by her.

Oregon Code 1930 Section 3-510:

"The purchaser from the day of sale, until a resale, or a redemption, and a redemptioner from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and in such

case, shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period."

On December 18, 1935, the District Court entered an order dissolving a restraining order made October 3, 1935 against the sheriff of Washington County, (R. 48) restraining the execution of a writ of assistance requiring him to oust the bankrupts from possession of the real property described in bankrupts' petitions. No appeal was taken from this order. The restraining order and the writ of assistance both related to the foreclosure proceeding of respondent Johnson against the bankrupts and did not include Mrs. Collins. This matter is in point for this respondent only because it is the law of the case of which Mrs. Collins can take advantage.

Nothing more happened in the bankruptcy proceedings, as far as it concerned Mrs. Collins or the property she bought at foreclosure, until July 15, 1936 when the bankrupts petitioned the Conciliation Commissioner for an order granting them immediate possession of Parcel 15, restraining Mrs. Collins from transferring said property and for extension of the redemption period (R. 19). On August 8, 1936 the Conciliation Commissioner made an order and decree denying the petition of July 15, 1936, (R. 49, 135) and from this order and decree no appeal was taken. On August 26, 1936 the redemption period in

the foreclosure sale expired, and on September 10, 1936 the Sheriff's deed was issued to Mrs. Collins on the foreclosure. (R. 73).

Oregon Code 1930 3-505:

"The mortgagor or judgment debtor whose right and title were sold, or his heir, devisee or grantee, who has acquired by inheritance, devise, deed, sale or by virtue of any execution, or by any other means, the legal title to the property sold, may, at any time within one year after the date of sale redeem the property on paying the amount of the purchase money, with interest thereon at the rate of 10 per centum per annum from the date of sale." Etc.

The foregoing facts show that from the time when the State court gained jurisdiction on December 19, 1934, the only one of the conditions described in (s) in order to obtain the stay provided for in paragraph (2) was the bankrupts' petition of February 8, 1935 for appraisal and possession. The appraisal didn't occur until October 28, 1936, (R. 58) more than six weeks after Mrs. Collins had received her deed.

The bankrupts cannot claim that they were without remedy to stay the foreclosure proceedings in the period between the adjudication and any stay to which they would be entitled under sub-section (s) paragraph 2. To prevent completion of foreclosure in that period, the bankrupts were entitled, on proper showing, to obtain a stay until it

became practicable for them to obtain a stay under subsection (s) paragraph 2. For example, in the Collins case, if the bankrupts before August 26, 1935, which was the date of sale, could have made a sufficient showing, the court would have granted a stay. They did, indeed, attempt something in that direction when, on October 3, 1935, they obtained the restraining order against the sheriff from executing the writ of assistance. Also when, on July 15, 1936 they petitioned for possession of the land and a restraining order from transfer of the property and for extension of the redemption period. In both these instances orders were made which showed that a sufficient showing for relief had not been made and, from the orders in both cases, no appeal was taken.

CONCLUSION

It may be true as Petitioner claims that a hardship has been imposed upon him. But whatever hardship he has suffered has been due to his own lack of diligence. Had he followed the procedure in the statute the result might have been different. Respondents have rights that are worthy of protection also. To upset such rights, diligently pursued, because this Petitioner has suffered, would be to make a mockery of diligent efforts to obtain recourse guaranteed by contract and statute. This the court will not do.

The foreclosures were completed during the time when the State court had exclusive jurisdiction.

Respectfully submitted,

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